



Jurisdictional Boundaries and Roles of Different Agencies: Models and Approaches

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Jurisdictional Division of Power

- The relationship between telecommunications laws and competition policies can be depicted through the jurisdictional division of power between competition authorities and regulatory institutions
 - With separate entities enforcing telecommunications and competition rules, the balance between them is a key element in allowing the industry to expand
 - With a single enforcement entity, such as a telecommunications regulator or a general competition authority, policies applicable to the telecommunications market should encourage growth and competition in the industry.



Typical Models

1. Concurrent Jurisdiction: Regulation by a telecommunications sector regulator *and* one or more entities responsible for competition matters
2. Regulation by a telecommunications regulator with sector-specific competition mandates
3. ICT sector commissioner is part of an industry-wide competition authority



Model 1: Existence of Competition and Telecommunications Authorities

- This model is seen in economies including the United States, Jamaica, Chile, South Africa, and India
- There are numerous variations of this approach
- To address potential overlap issues, agreements, interagency committees, and consultative committees are often developed to discuss how to manage cases in which jurisdiction overlaps one or more entities (e.g., United States, Canada, Jamaica and Turkey)



Model 1: Existence of Competition and Telecommunications Authorities

United States

- Regulator: Federal Communications Commission (FCC)
 - independent regulator overseeing interstate and international communications
- Competition Authorities:
 - Department of Justice (DOJ) – Antitrust Division has authority to prevent anticompetitive conduct (e.g., contract, combinations and conspiracies in restraint of trade) and to review proposed mergers and acquisitions of telecommunications carriers
 - Federal Trade Commission (FTC) – responsible for preventing and penalizing unfair and deceptive market practices in restraint of trade

Model 1: Existence of Competition and Telecommunications Authorities

United States (cont'd)

- Regulator/Competition Authority Responsibilities:
 - FCC has authority to review and approve (*ex ante*) merger transactions involving licensed telecommunications carriers
 - FCC and DOJ have concurrent authority to review mergers among telecommunications carriers
 - FCC is required to consult with DOJ prior to granting certain authorizations to local exchange carriers
 - Jurisdictional balance between FTC and DOJ
 - signed a Memorandum of Agreement in 2002 that gives DOJ primary responsibility for antitrust enforcement in several sectors, including telecommunications services and equipment
 - FTC reviews mergers involving cable or mass media entities

Model 1: Existence of Competition and Telecommunications Authorities

United States (cont'd)

- Focus of analysis:
 - FCC competition analysis focuses on public interest, convenience and necessity
 - DOJ and FTC merger enforcement focuses on competition issues

Model 1: Existence of Competition and Telecommunications Authorities

Chile

- Regulator: SUBTEL – within Ministry of Transportation and Telecommunication is agency responsible for overseeing the operations of telecommunications networks, and developing and enforcing technical industry standards
 - Approves the transfer of telecommunications concessions, authorizations or permits
- Competition Authority: Tribunal for the Defense of Open Competition (“Tribunal”) and National Economic Prosecutor (NEP) - primarily responsible for the promotion and protection of competition in all Chilean markets
 - authority to order Chilean regulators, including the telecommunications regulator, to take certain actions where it identifies competition concerns

Model 1: Existence of Competition and Telecommunications Authorities

Chile (cont'd)

- Competition authorities are not required to approve merger transactions
- Tribunal actions are taken in response to complaints from NEP or any interested private party
 - Tribunal may not initiate antitrust investigations on its own
- In general, SUBTEL competition actions are forward-looking, and Tribunal actions are retrospective
 - Exception: Telefónica Móviles' acquisition of BellSouth's mobile assets in Chile, in which parties asked Tribunal to approve transaction in order to avoid post-merger litigation



Existence of Competition and Telecommunications Authorities

Brazil

- Regulator: ANATEL, responsible for regulatory and competition-related issues
- Competition Authorities:
 - Administrative Tribunal: Administrative Council of Economic Defense (CADE)
 - independent agency administratively linked to Department of Justice
 - decisions can only be reviewed by courts
 - Investigative functions: the Secretariat of Economic Law (SDE) of Ministry of Justice, and the Secretariat for Economic Monitoring (SEAE) of Ministry of Finance (not really involved in telecom matters)



Existence of Competition and Telecommunications Authorities

Brazil (cont'd)

- The General Telecommunications Law (GTL) contains specific provisions governing the interplay between the telecommunications regulator, ANATEL, and CADE and establishing the hierarchy of competition law with respect to the telecommunications sector
- Under GTL, ANATEL must examine every merger, acquisition, transfer of assets but CADE must decide whether or not to approve the transaction.
- GTL provides that both competition authorities and ANATEL have jurisdiction over anticompetitive behavior

Model 1: Existence of Competition and Telecommunications Authorities

India

- Regulator: Telecommunications Regulatory Authority of India (TRAI) - independent body responsible for telecommunications matters
 - Facilitates competition through sector policy
 - Adjudicates disputes between service providers and between groups of licensees on certain matters
 - Does not have jurisdiction over “the monopolistic trade practice, restrictive trade practice and unfair trade practice.”
- Competition Authority: Competition Commission of India – enforces 2003 Competition Act, which prohibits anticompetitive agreements and abuse of dominant position, and regulates corporate “combinations” through acquisition of shares, control and mergers
 - Has an express mandate over competition issues with respect to a variety of services, including “communication” services

Model 1: Existence of Competition and Telecommunications Authorities

Potential Advantages of this Model:

- Generally specific areas of expertise and competency
- Each authority has certain powers, which may provide certain benefits depending on the case at hand (*e.g.* competition authorities tend to have broader powers to gather information than do sector-specific regulators)
- Checks and balances between agencies may mitigate both the risks and costs of regulatory mistakes
- Telecom-related matters that cannot be handled by the telecommunications regulator (due to gaps in the regime as established by the legislation or deficiencies in implementation of regulatory framework can be addressed by the competition authority)

Potential Disadvantages of Model:

- Relatively greater regulatory costs
- Potential duplication of efforts if responsibilities of each authority are not clearly defined
- Potential jurisdictional battles between two authorities
- Regulatory delays may result due to the inherent complexity of competition issue potentially having to be addressed by two agencies
- A lack of coordination can result in the implementation of inconsistent remedies by the regulator and the competition authority
- May result in forum shopping by private parties

Model 2: Enforcement of Sector-Specific Competition Rules by Telecommunications Regulator

Dominican Republic

- No general competition rules or authority
- Extensive body of telecommunications regulations that grants the telecommunications regulator (INDOTEL) exclusive power over competition in the sector
- The General Telecommunications Law (GTL) includes a set of competition rules and principles applicable to the telecommunications industry

Model 2: Enforcement of Sector-Specific Competition Rules by Telecommunications Regulator

Dominican Republic (cont'd)

- The GTL includes, for example, a section on “*Practices that Restrict Competition*” that specifically prohibits telecommunications carriers from engaging in certain anticompetitive practices
- The GTL also contains competition-specific definitions such as: effective competition, honest competition, discrimination, dominant position, anticompetitive practices, and practices that distort competition in the telecommunications market.
- The GTL requires telecommunications companies to obtain INDOTEL’s approval prior to the transfer of any license or consummation of merger.



Model 2: Enforcement of Sector-Specific Competition Rules by Telecommunications Regulator

Dominican Republic (cont'd)

- A Competition Bill is being worked on
- The major issue being debated is whether the Bill's provisions should complement those of the GTL and whether it would require the telecom regulator's involvement on telecommunications competition-related issues.

Model 2: Enforcement of Sector-Specific Competition Rules by Telecommunications Regulator

Potential Advantages of this Model:

- May allow for more cohesive regulation as telecom regulator is able to use competition principles and approaches for market definition and assessing market power
- May fill a necessary void if there is no competition authority or competition law
- May result in efficiencies if combine sectoral expertise and competition rules

Potential Disadvantages of this Model:

- Regulator's expertise may not be sufficient to apply both sector-specific regulation and competition laws
- Increased risk that decisions will not be made on competition policy principles alone but will be influenced by other policy objectives
- Consistency in competition decisions may be a problem in the sense that both the competition authority and the sector-specific regulator may have the competence and authority to enforce competition laws in some circumstances
- Increased risk of duplication if competition authority does exist or is created
- Increased risk of regulatory capture if competition issues are not addressed by industry-wide competition authority



Model 3: Enforcement of General Competition Policies and Sector-Specific Regulations by Competition Authority

New Zealand

- Telecommunications industry-specific provisions were introduced with the adoption of the Telecommunications Act in 2001
- General competition statutes play an important complementary role, notably the Commerce Act of 1986, as amended, which prohibits anticompetitive practices and business acquisitions that create or strengthen dominance



Model 3: Enforcement of General Competition Policies and Sector-Specific Regulations by Competition Authority

New Zealand (cont'd)

- Ministry of Economic Development (MED) - advises the Minister of Communications on the operation and regulation of specific markets and industries, including telecommunications
- Commerce Commission – Independent agency that serves as general, economy-wide competition authority
 - Responsible for enforcing competition legislation, including the Telecommunications Act 2001.
 - Within the Commission, primary responsibility for making decisions about, and providing advice to the Minister on telecommunications matters, rests with the Telecommunications Commissioner.



Model 3: Enforcement of General Competition Policies and Sector-Specific Regulations by Competition Authority

New Zealand (cont'd)

- Jurisdictional division of power between MED and Commerce Commission with respect to telecommunications matters is clearly defined in legislation, and is evidenced in rulemaking proceedings
- Minister of Communications has the ultimate authority to accept or reject the Commission's recommendations, or to require the Commission to reconsider its recommendation "for any reason specified by the Minister."
 - However, the Minister of Communications cannot reject the Commission's recommendation and substitute his own preferred outcome – if he rejects the Commission's recommendation, then the regulatory status quo prevails.



Model 3: Enforcement of General Competition Policies and Sector-Specific Regulations by Competition Authority

Potential Advantages to this Model:

- Limited jurisdictional overlap between the competition authority and the telecommunications regulator
- Certain issues (assessment of dominance, pricing, etc.) may be dealt with more easily
- Not partial to any one particular industry, possibly less prone to capture
- Competition authorities generally have broader powers in which to gather information
- Oversight is solely focused on ensuring competition but have a particular office that is focused on telecommunication issues

Potential Disadvantages to this Model:

- Limited experience with this model, has not been emulated in other countries,
- Difficult to execute in jurisdictions that lack expertise in the enforcement of generic competition laws.
- In smaller markets, may be difficult to have a particular person dedicated within the competition authority to telecommunication matters



Practical Lessons

- Objective of competition policy is to foster the expansion of the market, the availability of new technologies, and the accessibility of low-cost quality services to the public.
- No model is perfect and approach to take depends on maturity of the market, legislative and regulatory framework, and country's overall environment
 - May not be feasible for developing countries to engage in dramatic legislative change (*i.e.*, from sector-specific to general competition rules)
 - Due to the small number of players in a market, and the lack of technical, human and financial resources.
 - Legislative framework does not have a competition law and/or competition authority
 - Competition authority may not have the sector-specific expertise to address the issues



Practical Lessons

- Regulatory agencies should be aware of the importance of competition – when there are both regulatory and competition authorities, regulators should consult with competition authorities in the development of pro-competition policies
- An “open and active dialogue” should be maintained between competition authorities and sector regulators
- Having the competition authority adopt “formal procedures” – may include memoranda on cooperation and/or empowering the competition authority with decision making power on certain telecommunications specific matters



Thank You!

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